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NEGOTIATION AS ONE AMONG MANY TOOLS

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Even as this symposium examines the “canon” of negotiation, we think it is also important to consider negotiation’s context. In many cases, negotiation cannot be the first or the only activity that takes place. To make significant progress in the resolution or management of some conflicts, other activities will have to precede or supplement negotiation. This can be particularly true in large-scale, multi-party public disputes.¹

Consider the following situation, one that might be unfolding even as you read this in any number of places in the United States. The setting is the state of Grace, a relatively small state with a healthy mix of rural, metropolitan, and suburban populations. Grace is struggling these days to determine how its laws should treat same-sex couples. Grace’s neighbors to the north have seen judicial and legislative battles over marriage and civil union for same-sex couples. To the south, a neighboring state quietly passed domestic partnership legislation extending some but not all of the benefits of marriage to same-sex couples. Policymakers in Grace have followed these developments with interest.

In some ways, Grace is a “gay-friendly” state. It was one of the first to enact a statewide antidiscrimination statute protecting lesbian, gay, bisexual, and transgender (LGBT) citizens in employment, housing, and other contexts. Grace also recently enacted a second-parent adoption statute that permits same-sex couples to establish equal and mutual parenting rights with respect to the children they raise together. Even as it has enacted legislation that

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1. See Marcia Caton Campbell & Jayne Seminare Docherty, *What’s in a Frame? (That Which We Call a Rose by Any Other Name Would Smell as Sweet)*, 87 MARQ. L. REV. 769 (2004).

might be viewed as “pro gay,” in some ways Grace is rather conservative. With a strong concentration of Roman Catholics, particularly in its urban areas, many believe that Grace is unlikely to move dramatically in legislation; state representatives and senators are keenly aware that some devoutly religious constituents are opposed to sweeping changes in the marriage laws of the state.

In the last few years, several bills have been proposed to the judiciary committee of the Grace general assembly. That committee has held extensive public hearings to solicit opinions from experts and the general public on a host of legislative proposals—ranging from an outright ban on same-sex marriage (or, indeed, any legal recognition of same-sex couples), to domestic partnerships or civil unions, to full and equal marriage rights for same-sex couples.

Lawyers in the state of Grace are interested in the issue for a variety of reasons. Some are activists eager to push the state toward a change in the marriage law that would extend marriage rights to same-sex couples. Others are activists with the opposite agenda, wishing to hold the line on, or even reverse, an agenda they see as harmful to families and communities in the state. Still other lawyers are neutral or undecided with respect to the political issues, but they are concerned about promoting a good decision-making process. They want to serve a diverse group of clients effectively, and they worry about how to protect same-sex couples who want to arrange their legal and financial affairs.

In the interests of promoting conversation, one group of lawyers has been in contact with clergy people from a variety of denominations. Some of these clergy adamantly oppose marriage for same-sex couples because they view homosexuality as a mental or moral disorder. Other clergy support change in the civil law provided no pressure is applied to religious organizations. Still others lead denominations that celebrate marriage or holy unions for same-sex couples, and they would like to see these unions recognized as a civil matter as well.

Psychologists in the state have weighed in on the issue, again on both sides. Some are practitioners of “reparative therapy” and say that with treatment, motivated LGBT people can become heterosexual. These professionals are skeptical of any equal protection arguments that are based upon a claim that homosexuality is an immutable characteristic. Other mental health professionals vociferously reject “reparative therapy,” claiming instead that their patients, who are adults, adolescents, and children, suffer most from society’s condemnation of homosexuality—their own or (in the case of patients who are children) their parents’.

School officials wonder about the changes that might be wrought in

curricula related to civics, sex education, or family life skills if equal marriage rights are extended to same-sex couples. Public and private employers are concerned about the economic ramifications of a change in the marriage law.

Opponents of equal marriage rights for same-sex couples are anxious to keep the issue in the legislature, where they perceive a majority of legislators will preserve the current law restricting marriage to different-sex couples. Advocates for same-sex marriage have been pursuing legislative solutions, but are beginning to wonder if the courts' tradition of protecting minority groups from the "tyranny of the majority" might yield a quicker result. Federal legislators are considering a "Federal Marriage Amendment" designed to shut down all state judicial activity on this issue by making clear that marriage in the United States can only exist between a man and a woman and that neither the federal Constitution nor the constitution of any state can be read to require marriage or its legal equivalent for same-sex couples.²

Things are heating up in the state of Grace. Multiple perspectives and inflamed emotions are creating a cacophony of voices on the issue, but the state is missing a unified, coherent *conversation* about what should happen. The Human Rights and Responsibilities Committee ("HRR Committee") from the State Bar Association would like to spearhead some activities or meetings that might help to facilitate that conversation. What might they consider?

Perhaps a preliminary question to pose is whether this situation is amenable to negotiation at all. Conflicts are more easily negotiated when issues are of small stakes, of lesser consequence, and are easily divisible, rather than when issues involve deep values or there is a need to set legal precedent; when outcomes are positive rather than zero sum; when parties are well organized with strong leadership; and when individuals want or need to maintain good relationships over the long haul.³ In the current situation in Grace, it may be difficult to identify individuals who can legitimately speak for constituencies they purport to represent.⁴ Furthermore, the legal changes

2. The bi-partisan cosponsors of the Federal Marriage Amendment, H.R.J. Res. 56, 108th Cong. (2003), are: Collin Peterson (D-MN), Mike McIntyre (D-NC), Ralph Hall (D-TX), Marilyn Musgrave (R-CO), Jo Ann Davis (R-VA), and David Vitter (R-LA). The proposed amendment reads:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any state, nor State or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

Id.

3. Leonard Greenhalgh, *Managing Conflict*, 27 SLOAN MGMT. REV., Summer 1986, at 45-51; see also ROY J. LEWICKI ET AL., *ESSENTIALS OF NEGOTIATION* (3d ed. 2004).

4. See Jayne Seminare Docherty & Marcia Caton Campbell, *Teaching Negotiators to Analyze Conflict Structure and Anticipate the Consequences of Principal-Agent Relationships*, 87 MARQ. L.

sought by LGBT people and their allies in the state of Grace may be unobtainable without judicial or legislative action, and those decisions will almost certainly be the result of adjudication or legislative deliberation, not negotiation. Even if the lawyers' HRR Committee could find willing participants for multilateral negotiation, the participants would not be empowered to effect the legal change at issue.

An agreed-upon *procedure* for pursuing or considering legal change could be the product of negotiations, however. And certainly, social change could be subject to negotiation and discussion. But before interested parties come to a table to bat these issues around, perhaps preliminary work needs to be done. The rest of this essay will describe some activities that might precede or supplement negotiation of a large-scale public policy conflict such as this.

I. CAPACITY STRENGTHENING

"Capacity strengthening" refers to the work of non-governmental organizations (NGOs) that work with community members to increase the skills and understanding of individuals, organizations, and institutions to respond to conflicts. The approach relies upon the existence of key members of the community, whether individuals or institutions, who can act as "norm entrepreneurs"⁵ to foster the constructive handling of the conflict. In the state of Grace, the lawyers' HRR Committee could look for influential organizations—educational, religious, or financial—that might take the lead in facilitating fora or other discussions of the central issues related to same-sex couples' legal status.

II. SHUTTLE DIPLOMACY

At times, opponents locked in conflict cannot constructively discuss issues face to face. "Shuttle diplomacy" permits a neutral party to facilitate exchange not by physically convening opponents, but by passing information back and forth among them. A prominent legislator, academic, business person, or other community leader who has been neutral on the issue might step forward to serve in this capacity.

III. BACK-CHANNEL NEGOTIATIONS

The HRR Committee might offer to facilitate conversation on a

REV. 655 (2004).

5. See generally Christine Ingebritsen, *Norm Entrepreneurs: Scandinavia's Role in World Politics*, 37 COOPERATION & CONFLICT 11 (2002); Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 ARIZ. J. INT'L & COMP. L. 561 (2003).

confidential basis between highly placed actors within the gay rights advocacy organizations and some of the opposing organizations. For example, an interdenominational group of church leaders might like to discuss proposed legislation with the major gay-rights lobbying group to find out if an incremental approach would be acceptable.

IV. PRACTICAL COOPERATION PROJECTS

The HRR Committee might explore the possibility that some interests or concerns are shared by proponents and opponents of same-sex marriage despite their otherwise fundamental value differences. For example, the welfare of children is often cited by both sides as a justification for their respective positions. The HRR Committee might initiate a project to benefit children that could be supported by key organizations or individuals from both sides of the debate.⁶

V. RADIO AND TELEVISION

The HRR Committee might consider producing radio or television programs that would present information and debate on the issues at stake in the controversy. This would be particularly worthwhile if it seems that the popular media are covering the issues in ways that only increase polarization rather than foster public dialogue. The programs produced by the HRR Committee need not be limited to "talking head" formats. In Burundi, Liberia, and Sierra Leone, NGO Search for Common Ground (SFCG) operates radio studios that produce news, features, drama, and music.⁷

VI. PRINT JOURNALISM

Because press reporting can exacerbate or defuse polarized response to social change, the lawyers' committee might interface with journalists to promote fair and full reporting of the issues in ways that give the citizens of the state of Grace information they need to determine the course of the state.

6. The NGO Search for Common Ground has facilitated regional cooperation between Israel and its Arab neighbors to reduce the threat of biological or chemical incidents, both intended or accidental. This is a good example of a practical cooperation project because it stems from shared interests of adversaries otherwise locked in conflict. John Forester also describes a large and lengthy consensus building process in Colorado to set state HIV and AIDS spending priorities for federal monies. Again, the focus on a practical problem was used to work around fundamental disagreements about homosexuality among the diverse participants. See John Forester, *Dealing with Deep Value Differences*, in *THE CONSENSUS BUILDING HANDBOOK* 463, 463-94 (Lawrence Susskind et al. eds., 1999).

7. A particular SFCG specialty is "soap opera for social change," which SFCG produces in eight countries, as well as programming produced by and for children.

SFCG, again a leader in this field, holds workshops for journalists in Africa, the Middle East, and the Aegean region to try to diminish inflammatory reporting and promote mutual understanding. In the Balkans, SFCG produces two magazines that examine controversial issues through the perspectives of journalists from different ethnicities. In the United States, the Pew Center for Civic Journalism offers training materials and funding resources for journalists who want to help citizens engage in public dialogue and problem solving. The HRR Committee could approach a major local newspaper in the state of Grace about applying for funding from the Pew Center to undertake a civic journalism project around gay rights issues to stimulate public dialogue.

VII. PUBLIC DIALOGUE, CONSENSUS BUILDING, AND VISIONING FORA

Numerous NGOs regularly hold workshops or facilitate processes designed to tackle controversial or divisive issues on which progress must be made for the public good and for community life. In addition to the work by SFCG described above, the Public Conversations Project (PCP) assists groups such as the lawyers' committee in convening constructive dialogues among people with fundamental value and worldview differences over difficult issues such as those confronting the state of Grace. PCP helps participants develop more productive ways of communicating and stating their perspectives constructively so they can be heard by others.

Visioning processes convene groups of people to brainstorm and build consensus on preferred futures for their community—"the set of conditions they want to see realized over time."⁸ These processes come in many forms, several of which may prove useful to the HRR Committee. "Study circles"⁹ could be set up in communities around the state of Grace to allow groups of invited citizens to take part in highly participatory, small-group discussions of the issues. In "community-wide visioning," an entire community is invited to participate in facilitated meetings directed toward envisioning a desired future for their community. Although this would be unwieldy and impractical at the statewide level, it could be productively used at the smaller community or neighborhood level, with the results used to build toward a broader consensus of communities statewide. "Search conferences" bring a group of stakeholders together for a concentrated period of time (typically two to three days) to discuss an issue exhaustively, envision an ideal future scenario, and

8. Carl M. Moore et al., *Visioning*, in *THE CONSENSUS BUILDING HANDBOOK* 558 (Lawrence Susskind et al. eds., 1999).

9. Study circles can refer to a process, but it is also the name of an organization. Study Circles (the organization) creates and disseminates dialogue materials at no cost to the users. They might be convinced by the lawyers' committee to create materials pertaining to this issue (see <http://www.studycircles.org>).

develop action steps to realize that future. For example, the HRR Committee might host a search conference of lawyers, legislators, policy makers, and gay rights groups to develop a process for attempting legal change.¹⁰ Documenting the results of processes such as these also makes excellent fodder for a civic journalism project.

VIII. CULTIVATING AND DEVELOPING LEADERSHIP IN THE “RADICAL CENTER”

Even as we are engaging in a variety of productive, nonviolent, peacebuilding responses to a difficult conflict such as the one in the state of Grace, we need to recognize that other parties will choose to act differently. Parties with strong feelings will use litigation, media messages, protests, political processes and campaigns, and possibly even violence to promote their own views. There is a high potential for this situation to polarize and become intractable. The key to a peacebuilding response is promoting and building the capacity of the “radical center”—those citizens who want a reasonable, fair, and just outcome to the problem. Helping this radical center find a voice, develop leadership skills, and craft clear statements of a moderate option to extreme rhetoric can be the key to preventing a conflict such as this one from becoming intractable. Sometimes the radical center needs to organize itself rather than just work within existing organizations.¹¹

IX. CONCLUSION

The state of Grace is in dire need of a resolution to the legal issues concerning the treatment of same-sex couples. To set the context for productive negotiations about legislative change, a much broader public dialogue about social change must first be initiated. Citizens of the state of Grace must be engaged in constructive conversations about potential social changes related to gay rights—what futures do they desire or fear? Despite differences in perspective or worldview, what can citizens do to come together to collectively envision their future? This essay has described a range of activities that can, and should, precede negotiation of the issues pending in the state of Grace. This essay also seeks to remind us of the fruitful partnerships that can be established with the NGOs working in the

10. Moore et al., *supra* note 8, at 582-84.

11. For example, the Quivira Coalition was formed by a group of progressive ranchers, moderate environmentalists, and land managers who were tired of the legal battles and frustrated with the fact that the rangelands in the Southwest were deteriorating, communities were impoverished, and nothing was being decided. They meet to discuss different options for managing rangelands, and they build the capacity of progressive leadership in their respective organizations.

field of conflict resolution to ensure that our different efforts toward building trust among stakeholders and finding negotiated resolutions complement one another successfully.

APPENDIX: REFERENCES

E. FRANKLIN DUKES, *RESOLVING PUBLIC CONFLICT: TRANSFORMING COMMUNITY AND GOVERNANCE* (1996).

ROY J. LEWICKI ET AL., *ESSENTIALS OF NEGOTIATION* (3d ed. 2004).

Jayne Seminare Docherty & Marcia Caton Campbell, *Teaching Negotiators to Analyze Conflict Structure and Anticipate the Consequences of Principal-Agent Relationships*, 87 MARQ. L. REV. 655 (2004).

John Forester, *Dealing with Deep Value Differences*, in *THE CONSENSUS BUILDING HANDBOOK* 463, 463-94 (Lawrence Susskind et al. eds., 1999).

Leonard Greenhalgh, *Managing Conflict*, 27 SLOAN MGMT. REV., Summer 1986, at 45-51.

Carl M. Moore et al., *Visioning*, in *THE CONSENSUS BUILDING HANDBOOK* 557 (Lawrence Susskind et al. eds., 1999).

Pew Center for Civic Journalism at <http://www.pewcenter.org/>.

Public Conversations Project at <http://www.publicconversations.org/>.

Search for Common Ground at <http://www.sfcg.org/>.

Study Circles at <http://www.studycircles.org/>.